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No. 07-582

In the

SUPREME COURT OF THE UNITED STATES

October Term, 2008

FEDERAL COMMUNICATIONS COMMISSION, et al.
Petitioners,

v.

FOX TELEVISION STATIONS, INC., et al.
Respondents.

ON WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION AND THE MEDIA INSTITUTE IN SUPPORT OF RESPONDENTS

Robert M. O'Neil (Counsel of Record)
J. Joshua Wheeler
The Thomas Jefferson Center for
the Protection of Free Expression
400 Worrell Drive
Charlottesville, VA 22911
434-295-4784
Counsel for *Amici Curiae*

August 8, 2008

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CONSENT TO FILE

Written consent to file in this matter was provided by all parties and is on file with the Clerk of this Court.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Media Institute is an independent, nonprofit research organization located in Arlington, Virginia. Through conferences, publications, and filings with courts and regulatory bodies, the Institute advocates a strong First Amendment, a competitive communications industry, and journalistic excellence. The Institute has participated as *amicus curiae* in numerous court proceedings, including cases before the United States Supreme Court and federal courts of appeal.

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country.

STATEMENT OF THE CASE

This case pertains to an order of the Federal Communications Commission ("FCC") holding that music award programs broadcast by respondent were in violation of the indecency and profanity provisions of 18 U.S.C. § 1464 because of two unscripted expletives uttered by a celebrity in presenting an

award, and a spontaneous expletive uttered by an award winner in his acceptance speech. The United States Court of Appeals for the Second Circuit held that, because the FCC had previously held that fleeting, non-literal expletives did not constitute indecency, the order in question represented an arbitrary and capricious change in policy in violation of 5 U.S.C. § 706(2)(A) of the Administrative Procedure Act. This appeal followed.

SUMMARY OF ARGUMENT

Three basic principles should guide the disposition of this case, and amply warrant affirmance of the judgment of the Court of Appeals. First, the expression at issue here is fully protected by the First Amendment, since it falls under none of the exceptions this Court has recognized and

consistently applied in free speech and free press cases. Second, the standards which the Commission applied to these respondents far exceed the very limited scope of this Court's tolerance for regulation even in the special circumstances of licensed broadcasting. Third, all valid needs and interests of our society may be effectively protected by standards that comport with the rigorous safeguards of the First Amendment.

Beyond such issues of broadcasters' freedom of expression and its regulation, *amici curiae* fully share the concerns expressed by the Court of Appeals about the procedures by which the challenged standards were fashioned and applied. The Second Circuit's scathing criticism of the Commission's procedures, and of its inexplicable abandonment of seemingly settled regulatory standards, amply

warrant affirmance of the judgment below. Not only did the Commission dramatically and suddenly alter the standards by which it determined and regulated "indecent" material on the airwaves; the stated rationale for such a drastic revision of policy failed any possibly pertinent criteria and thus, as the Court of Appeals ruled, violated the agency's basic responsibilities under the Administrative Procedure Act. While the ruling below could be affirmed solely on such non-constitutional grounds, the lurking presence of several troubling First Amendment questions warrants the broader approach which the Court of Appeals adopted and which *amici curiae* urge in this brief.

I. THE EXPRESSION TARGETED BY THE CHALLENGED FCC ORDERS IS FULLY PROTECTED UNDER THE FIRST AMENDMENT.

As the Court of Appeals recognized, "all speech covered by the FCC's indecency policy is fully protected by the First Amendment." *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 462 (2d Cir. 2007) (citing *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989)). It was this vital premise that caused the Second Circuit to "question whether the FCC's indecency test can survive First Amendment scrutiny." *Fox Television*, 489 F.3d at 463. The Court of Appeals went on to observe that "the FCC's indecency test raises the separate constitutional question of whether it permits the FCC to sanction speech based on its subjective view of the merit of that speech." *Id.* at 464. While the court below had

no direct need to address the constitutional dimensions, such observations as the majority offered are most pertinent and merit amplification here.

This Court has never wavered from the view that all expression is presumptively protected by the First Amendment, save only where it falls within one of a small number of carefully defined exceptions, e.g., direct incitement to imminent lawless action, obscenity, and child pornography. Thus as Justice Harlan eloquently recognized in *Cohen v. California*, 403 U.S. 15, 24 (1971), even vulgar and widely offensive language may not be subject to governmental sanctions since "the constitutional right of free expression is powerful medicine in a society as diverse and populous as ours." Memorable from the *Cohen* ruling were such maxims as "one man's vulgarity is [often] another's lyric" and the

premise that "words are often chosen as much for their emotive as their cognitive force." *Id.* at 25, 26. The Court also cautioned against "the facile assumption that one can forbid particular words without running a substantial risk of suppressing ideas in the process." *Id.* at 26. The Court of Appeals expressly invoked a closely related principle – this Court's deep distrust of any regulatory regime that permits a government agency to "sanction speech based on its subjective view of the merits of that speech." *Fox Television*, 489 F.3d at 464. Especially pertinent to the court below were such rulings as *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992), and *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988). See *Fox Television*, 489 F.3d at 464. The relevance of these precedents was the unavoidable

recognition that the FCC actions challenged here are part of a regulatory scheme in which a government agency asserts and imposes substantial discretion in regard to the content of protected speech. As the Second Circuit observed, official actions of the type challenged here represent the exercise of precisely such governmental authority, and invite judicial concern for that, among other, reasons. *See id.* at 455-67.

While this Court has not directly revisited the status of vulgar or taboo language in any context such as that of the *Cohen* case, little doubt remains of the universal scope of *Cohen*'s protection for such unwelcome and uncivil language. The only possible exception to this doctrine arises in the unique context of licensed broadcasting, discussed in Part II below.

In recognizing so powerful a presumption of protection, our First Amendment and the cases applying it are nearly unique even among the most protective of legal systems, many of which compel the speaker to identify a rationale for protection rather than placing, as we do, the burden on government to demonstrate the basis for regulation. This Court recently recalled the centrality to our constitutional jurisprudence of that delicate but vital balance. In striking down one part of the Child Pornography Prevention Act, Justice Kennedy's majority opinion cautioned that "the Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002).

The FCC orders that are challenged here reveal both a deep distrust and a profound misunderstanding of this central premise of our First Amendment. Whatever might be the possible basis for regulation of broadcast material targeted as "indecent," the starting point of any analysis must be the presumption of constitutional protection, as much for that which offends and disgusts as that which pleases and delights. To invoke Justice Harlan's *Cohen* opinion once again: "most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions . . . to the usual rule that governmental bodies may not prescribe the form or content of individual expression." *Cohen*, 403 U.S. at 24.

II. THE CHALLENGED ORDERS SUBSTANTIALLY EXCEED SPEECH RESTRICTIONS THIS COURT HAS SANCTIONED.

Whatever may be the technical differences among expressive media, they have never been held to justify substantially different levels of constitutional expression. From the outset, this Court and other courts have acknowledged such differences and their regulatory consequences. Most notably in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), a bare majority of this Court sustained a very limited use of the Commission's statutory authority to sanction the broadcasting by licensees of material that could be deemed "indecent." Not only did the Commission itself recognize the very limited nature of the authority it was seeking; two Justices whose concurrence was vital to the result expressly

cautioned that so narrow a ruling "does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered . . . here." *Id.* at 760-61 (Powell, J., concurring in part). Thereafter, Justice Powell's concurring assumption that "the Commission may be expected to proceed cautiously, as it has in the past" proved prophetic. *Id.* at 761 n.4 (Powell, J., concurring in part). Until quite recently, the FCC has in fact honored that expectation in its sparing view of the authority accorded by *Pacifica*. *See Fox Televisio*n, 489 F.3d at 449-50.

Even more significant than the Commission's regulatory course has been this Court's steadily narrowing construction of the FCC's authority. Notably, in *Sable Communications*, 492 U.S. at 126,

this Court left no doubt that speech "which is indecent but not obscene is protected by the First Amendment" and may not be regulated in any context other than licensed broadcasting – specifically telephonic communications. *Id.* at 131. That view was forcefully reaffirmed in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 822-23 (2000), with respect to cable broadcasting, and most notably with regard to the Internet in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). In *Reno*, Justice Stevens noted several vital limitations to the continuing force of *Pacifica* as precedent for regulating in any context. *Id.* at 867. First, he emphasized that *Pacifica* focused on a "specific broadcast that represented a rather dramatic departure from traditional program content in order to designate when – rather than whether – it

would be permissible to air such a program in that particular medium." *Id.* Second, the Justice noted that *Pacifica* involved the non-punitive nature of the Commission order. *Id.* Finally, Justice Stevens emphasized that *Pacifica* involved the unique context of the medium of radio communications which "as a matter of history had 'received the most limited First Amendment protection . . . .'" *Id.* at 867 (quoting *Pacifica*, 438 U.S. at 748.)

Such rulings as these evidence this Court's growing discomfort with the continued vitality not only of *Pacifica* itself but of the anomalous status of licensed broadcasting under federal law. In *Denver Area Educational Telecommunications Consortium v. FCC*, Justice Thomas was joined by Justice Scalia and then-Chief Justice Rehnquist in observing that the current distinctions among media for First

Amendment purposes were "dubious from their infancy" and have created increasing anomalies for communications entities, most especially those engaged in cable broadcasting. 518 U.S. 727, 813 – 14 (1996) (Thomas, J., concurring in part and dissenting in part). Dramatic changes in technology and the very nature of communications only serve to heighten such concerns, and at the very least counsel caution in validating possibly outmoded assumptions about the very nature of the regulatory field. *See id.* at 776-77 (Souter, J., concurring).

Even more compelling in some respects has been the Commission's own (until very recently) extremely narrow view of the scope of its authority over arguably "indecent" broadcast material. *See Fox Television*, 489 F.3d at 451. Despite an occasional rebuke for having strayed beyond those bounds – the

"dial-a-porn" order invalidated in *Sable*, for example – it is notable that the other occasions which required this Court's intervention (to protect cable and the Internet) reflected the excessive zeal not of the Commission but rather of Congress. Consistent agency rulings during the quarter century that followed *Pacifica* amply validated Justice Powell's expectation that the Commission's enforcement of the indecency standard would be "restrained." *See Fox Television*, 489 F.3d at 448-51.

Specifically, as the Second Circuit observed, the FCC's own consistent view of salacious broadcasts clearly exempted from sanctions material that was not "patently offensive" and did not describe or depict "sexual or excretory organs or activities," and thus would clearly have exempted "fleeting expletives." *Id.* at 450; *see also Citizen's Complaint*

Against Pacifica Found. WBAI(FM), N.Y., N.Y., 56 F.C.C.2d 94, P 11 (1975). Nor was there any possible basis for the inclusion within the Commission's regulatory sights of broadcast material that was merely "profane" without the requisite elements of indecency; despite the presence of both terms in the statute as early as 1927, they had never previously been disjoined in this manner. *Fox Television*, 489 F.3d at 461-62. It was not until 2004 that the Commission departed significantly from what had been its consistent interpretation and application of this Court's *Pacifica* standard. *Fox Television*, 489 F.3d at 461; *see also Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program,* 18 F.C.C.R. 19859 (2004) ("*Golden Globes II*"). The rationale for that departure evoked harsh criticism from the Second

Circuit as well as that court's deep concern for the absence of a defensible rationale for so profound a regulatory metamorphosis. *See Fox Television,* 489 F.3d at 461.

Finally, there seems little doubt that time and technology have undermined whatever logical support the *Pacifica* ruling might have merited three decades ago. As the dominant position of licensed broadcasting is steadily eroded by the ever–expanding options in television viewing–only 14% of American television households are limited to exclusively broadcast stations (*In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 F.C.C.R. 2503, 2508 (2006))–the impact of licensed broadcasting's content on national mores and values diminishes correspondingly. Moreover, the always

tenuous assumption that licensed broadcasters were uniquely capable of inflicting harm on unwary young listeners and viewers has long since been undermined if not wholly repudiated. Meanwhile, it is worth recalling, as did the court below, the ominous prospects that led the Court of Appeals for the D.C. Circuit to reject on First Amendment grounds the *Pacifica* order. The claimed FCC authority, warned that court, would prohibit "the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the Bible." *Fox Television*, 489 F.3d at 448 (quoting *Pacifica Found. v. FCC*, 556 F.2d 9, 14 (D.C. Cir. 1975)).

Although the continued vitality of *Pacifica* is not inescapably implicated in this case, that issue cannot long be postponed, and in the event of a reversal would become logically impossible to avoid. Surely the question whether *Pacifica* – arguably a defensible disposition in 1978 – is equally entitled to comparable deference in 2008 – merits this Court's close attention.

III. THE COMMISSION'S SUDDEN AND DRAMATIC CHANGE IN ITS REGULATORY STANDARDS FAILED IN CRITICAL RESPECTS TO MEET BASIC PRINCIPLES OF ADMINISTRATIVE LAW.

As the Court of Appeals recognized, the FCC's sharp and sudden reversal of policy regarding broadcast "indecency" failed to meet even rudimentary standards of administrative law. *Fox Television*, 489 F.3d at 455. For many years, the Commission had announced and applied a far more

tolerant standard in this sensitive area – one that comported fully with this Court's expectations in *Pacifica* that statutory authority over "indecent" material would be invoked sparingly. *Pacifica*, 438 U.S. at 750. Specifically, the FCC's well settled policy regarding alleged indecency demanded clear proof of such vital elements as that the charged material must be shown to be "patently offensive" and that it must "describe or depict sexual or excretory organs or activities." *Fox Television*, 489 F.3d at 451 (citing *Industry Guidance on the Comm'n's Case Law Interpreting 18 U.S.C.* § 1464, 16 F.C.C.R. 7999 at PP 7 – 8 (2001)).

As late as 2001, the Commission recognized that "indecent speech is protected by the First Amendment, and thus, the government must both identify a compelling interest for any regulation it

may impose on indecent speech and choose the least restrictive means to further that interest." *Fox Television*, 489 F.3d at 451 (citing *Industry Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464*, 16 F.C.C.R. 7999 at P 3. Accordingly, broadcast material such as "fleeting expletives" and evanescent images might have been offensive to many listeners and viewers, but clearly could not have been deemed "indecent" on that basis alone. Indeed, the consistency with which this standard reflected the Commission's view of salacious material in the quarter century following *Pacifica* was remarkable, and gave the broadcast industry ample assurance that only a certain category of carefully defined language or imagery could incur FCC sanctions. See *Fox Television*, 489 F.3d at 448-50.

The court below is not the only federal appellate court to take note of the FCC's remarkably consistent attitude toward fleeting material and indecency. In an even more recent decision, the 3rd Circuit engaged in a lengthy overview of the history of the FCC's approach to indecency and found that it had established "a consistent and entrenched policy of excluding fleeting broadcast material from the scope of actionable indecency." *CBS Corp. v. FCC*, No. 06-3575, slip op. at 24 (3d Cir. July 21, 2008) (*available at* www.ca3.uscourts.gov/opinarch/063574p.pdf). The industry's reliance on such a regulatory posture was amply justified and hardly surprising.

The alacrity with which that standard was abandoned was as striking as the distance that now separated the new policy from the old. In reversing

the Enforcement Bureau's ruling with respect to a single, isolated profanity on a national network broadcast, the Commission declared that any use on the air of certain vulgar and taboo words was now per se "patently offensive" and thus incurred legal sanctions regardless of context or any other hitherto relevant criteria. Quite simply, said the Commission of its long-standing and consistently affirmed standards for "indecency," "any such interpretation is no longer good law." *Fox Television,* 489 F.3d at 452 (citing *Golden Globes II*, 18 F.C.C.R. 19859 at P 12 (2004)).

Even more remarkable than the speed and the import of such a change in policy was the absence of any credible or probative rationale. As the Court of Appeals recognized after a careful review of the asserted regulatory interests, "the Remand Order

provides no reasoned analysis of the purported 'problem' it is seeking to address with its new indecency policy from which this court can conclude that such regulation of speech is reasonable." *Id.* at 461. Indeed, such modest desiderata as could be identified in the Commission's new policy and enforcement rulings seemed to the Court of Appeals either lacking in credibility or logically unrelated to the asserted regulatory interests. The more deeply the Court of Appeals probed the FCC's stated rationale for the dramatic shift in regulatory policy, the less satisfying and convincing became the asserted justifications. Thus the Second Circuit's conclusion that "the FCC's new indecency regime . . . is invalid under the Administrative Procedure Act" was amply warranted and fully justified the court's action. *See id.* at 462.

Although not an issue directly before this Court, the Commission's handling of "profanity" provides a corollary to the metamorphosis of "indecency" in demonstrating the Commission's disregard for the limiting principles of *Pacifica*. Although the agency has since 1927 had statutory authority to regulate material that was "profane" as well as that which was "obscene" or "indecent," the Second Circuit correctly noted that "prior to 2004, the Commission never attempted to regulate 'profane' speech." *Fox Television*, 489 F.3d at 461, 466. Any references to "profanity" occurred solely in the context of what was either "obscene" or "indecent." *See id.* at 467. Commission rulings consistently declared that "profanity that does not fall under one of the above two categories [indecent or obscene] is fully protected by the First Amendment and cannot be regulated."

Id. at 462 (quoting *FCC, The Public and Broadcasting*, 1999 WL 391297 (June 1999)).

While this Court has never had occasion to address that issue, the clear import of *Pacifica*'s very limited approval of regulatory authority over "indecency" is that any assertion of agency power over profanity that is neither indecent nor obscene would be wholly unwarranted and clearly unconstitutional. Thus quite apart from the way in which "indecency" has been summarily redefined, the Commission's concurrent assertion of a wholly novel regulatory power over non-indecent profanity merits separate and deep concern not only among broadcasters but among all those who are concerned about freedom of expression.

The procedural flaws on which the Court of Appeals primarily relied are substantial and amply

warrant the conclusion that court reached. They are, however, closely related to the First Amendment issues which that court also felt deserving of attention, and to which it devoted a substantial portion of its opinion. *Amici* urge this Court to recognize that very nexus as it reviews the judgment of the Second Circuit.

IV. VITAL NATIONAL INTERESTS IN BROADCAST CONTENT MAY BE ADEQUATELY PROTECTED IN WAYS THAT ARE CONSISTENT WITH FIRST AMENDMENT SAFEGUARDS.

Certain technical differences among communications media may warrant contrasting regulatory approaches. Thus, for example, a ban on the broadcast of material that is found to be legally obscene or to contain child pornography seems beyond challenge, assuming that administrative enforcement procedures adequately ensure due

process – even though such actions may not (and logically cannot) duplicate all the procedures of a court in a criminal prosecution. Additionally, broadcasters may be required to document certain activities, including the content of material that airs on radio and television.

Viewer and listener interests may be, and are, protected in other ways that may be distinctive to the electronic media, but are also compatible with First Amendment safeguards. Notably, this Court's ruling in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), recognized the appropriateness of measures Congress had adopted to empower cable subscribers to determine the content of material which they received, and to block certain material that families might choose not to receive. Analogous possibilities deserve

consideration in this area, although particular technologies are clearly not appropriate for detailed discussion here.

In these and other ways, such national interests as merit protection by federal agencies may receive such deference consistent with the rigorous requirements of the First Amendment.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to affirm the judgment of the Court of Appeals and to remand for further proceedings.

Robert M. O'Neil (Counsel of Record)
J. Joshua Wheeler
The Thomas Jefferson Center for
the Protection of Free Expression
400 Worrell Drive
Charlottesville, VA 22911
434-295-4784
Counsel for *Amici Curiae*